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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YAN SUI et al.,	
Plaintiffs and Appellants,	G051520
v.	(Super. Ct. No. 30-2010-00342510)
STEPHEN D. PRICE et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Linda S. Marks, Judge. Affirmed.

Yan Sui and Pei-yu Yang, in pro. per., for Plaintiffs and Appellants.

Cane, Walker & Harkins and James C. Harkins, IV for Defendants and Respondents.

* * *

Plaintiffs Yan Sui and Pei-yu Yang appeal from the judgment dismissing with prejudice their action against defendants Stephen D. Price, Michelle J. Matteau, and 2176 Pacific Homeowners Association after the court sustained without leave to amend defendants' demurrer to plaintiffs' operative complaint on the ground another action was pending between the same parties on the same causes of action. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY[1]

Plaintiffs' First Amended Complaint

Plaintiffs alleged the following facts in their operative first amended complaint (FAC).

Plaintiffs owned property located in the 2176 Pacific Avenue Homeowners Association (Association). Price was Matteau's husband and the president of the Association. Matteau was the Association's secretary and one of the five homeowners in the Association.

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[1] We limit our recitation of facts and procedural history to those pertinent to the issues on appeal. Plaintiffs' opening brief challenges the court's order sustaining defendants' demurrer to plaintiffs' negligence, breach of contract, and breach of fiduciary duty claims, to the extent those claims are based on defendants' alleged (1) installing a satellite dish and refusing to remove it; and (2) commencing foreclosure proceedings against plaintiffs' home in violation of the declaration of covenants, conditions, and restrictions (CC&R's).

We deny plaintiffs' request for judicial notice of exhibits which were not before the trial court and outside the record on appeal. We deny plaintiffs' supplemental request for judicial notice because the exhibits are not relevant to the reason for our affirmance of the judgment. We also deny defendants' request for judicial notice because the exhibits are not relevant to the reason for our affirmance of the judgment. We grant plaintiffs' motion to strike the portions of the respondents' brief which refer to van towing, related debt reporting, and the current ownership of the subject home, because plaintiffs' appeal does not encompass the van towing and debt reporting issues, and because the current ownership of the subject home is not relevant.

Beginning in March 2005, plaintiffs "stopped paying the regular monthly due[s] of $79" because they disputed defendants' spending of Association funds. From March through September of 2005, plaintiffs paid one-fifth of the Association's trash and gardening bills and requested copies of the Association's other bills, so one-fifth of them could be paid. In September 2005, defendants' agent, McIntyre Law Group, sent plaintiffs an assessment of dues, late charges, interest, and collection costs, including "'Harkins' charges" of $1,260.[2] Plaintiffs sent McIntyre Law Group a letter contesting "the validity [of the] 'Harkins' charges . . . ." McIntyre Law Group returned plaintiffs' check for about $65 intended to cover one-fifth of "other expenses."

Defendants recorded a "Notice of Default and Election to Sale" concerning plaintiffs' property based on "delinquent monthly dues of about $553." Plaintiffs paid about $3,860 under protest, "to reinstate the non-judicial foreclosure."

On plaintiffs' information and belief, Price refused to take down a satellite dish installed on Matteau's property, unit B. Plaintiffs told Price the installation of the satellite dish violated the CC&R's. Price contended the Davis-Stirling Act exempted the satellite dish from the terms of the CC&R's, but plaintiffs disagreed "because the dish [was] visible from the common areas."

Under the heading "Instant Causes of Action Are Not Res Judicatas," the FAC stated: "Plaintiff cited some of the causes of action in this action, which may sound familiar in cases of 06CC07649. However, they are distinguishable from prior actions. The causes of action cited in prior cases had not been actually debated and decided by the Court."

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[2] Defendants' brief sheds light on plaintiffs' reference to "Harkins charges." Defendants state that, due to plaintiffs' failure to pay assessments, the Association commenced a collection action resulting in legal fees owed to Cane, Walker & Harkins LLP and the McIntyre Law Group.

In the FAC's negligence, breach of contract, and breach of fiduciary duty causes of action, plaintiffs alleged defendants violated the CC&R's by initiating a civil suit against them before the delinquent dues reached $1,800; by "doctor[ing]" the notice of default with "'Harkins' charges"; and by enforcing the payment of monthly dues by means of nonjudicial foreclosure "for an amount of $530." Plaintiffs further alleged that Civil Code section 1367.4, subdivision (b) "supersedes" the CC&R's "'Enforcement by Lien' under Art. IV, Section 3." As to the satellite dish, they alleged defendants' satellite dish violated the CC&R's, and the issue was not barred by res judicata, because the prior suit involved a "dish installed on unit E," whereas defendants' satellite dish was above the common driveway and visible from the common area.

Plaintiffs prayed for, inter alia, Matteau's removal of the satellite dish and compensatory damages.

Defendants' Demurrer

Defendants specially demurred to plaintiffs' negligence, breach of contract, and breach of fiduciary duty claims because, inter alia, there existed "another action pending between the same parties on the same allegations" within the meaning of Code of Civil Procedure section 430.10, subdivision (c).[3]

Defendants argued that plaintiffs' negligence, breach of contract, and breach of fiduciary duty claims concerning the satellite dish and the foreclosure proceedings were the subject of (1) Sui's action against defendants in Orange County Superior Court (OCSC) case No. 06CC07649, in which Sui alleged Matteau and Price wrongfully installed a satellite dish on their unit, and the Association wrongfully commenced nonjudicial foreclosure proceedings to collect delinquent Association assessments from plaintiffs; and (2) Sui's action against Matteau and Price in OCSC case

[3] All statutory references are to the Code of Civil Procedure unless otherwise stated.

No. 30-2009-000329341, in which Sui alleged Matteau and Price wrongfully installed a satellite dish on their unit; and (3) Sui's action against Price and the Association in OCSC case No. 30-2010-00353446 in which Sui alleged complaints concerning the Association's amended parking rules and the towing of a vehicle in violation of the rules.

Defendants contended their demurrer should be sustained because they had obtained a judgment in OCSC case No. 06CC07649 which was based upon allegations arising from the same facts and circumstances alleged by plaintiffs in their current negligence, breach of contract, and breach of fiduciary duty causes of action, and because of the other actions pending between the same parties on the same allegations.

The Interlocutory Judgment

The court sustained defendants' demurrer to all of plaintiffs' causes of action because there was another action pending between the same parties on the same causes of action, and the doctrine of res judicata barred all other theories of recovery. The court entered an interlocutory judgment pursuant to section 597 abating plaintiffs' action pending resolution of OCSC case Nos. 30-2009000329341 and 30-2010-00353446; and decreed that the doctrine of res judicata barred all other theories and claims in the within action based on the judgment in OCSC case No. 06CC07649.

The Final Judgment

A judgment of dismissal was finally entered on July 10, 2015, in which the court found that final judgments had been entered against plaintiffs' interests on the issues and causes of actions in OCSC case Nos. 30-2009-000329341 and 30-2010-00353446 and that plaintiffs had exhausted their appellate rights in those cases. The court, inter alia, (1) sustained without leave to amend defendants' demurrer on grounds that the final judgments entered in OCSC case Nos. 06CC07649, 30-2009-000329341, and 30-2010-00353446 "were commenced prior to the within action, were between the

same parties or their privies, were on the same causes of action, and seek the same relief as the within action, and that the doctrine of res judicata bars all theories and claims in the within action," and (2) dismissed with prejudice plaintiffs' action which is the subject of this appeal.[4]

DISCUSSION

Plaintiffs contend, as to the satellite dish and nonjudicial foreclosure issues, that the court failed "to evaluate as a matter of fact which of these two issues have been actually argued and decided in a final judgment on the merits" and that the court failed to require defendants to satisfy their burden of proof concerning res judicata.

As to the satellite dish, plaintiffs argue OCSC case No. 06CC07649 involved dish E (not dish B) and there was no discussion of dish E because the case was dismissed. They argue OCSC case No. 30-2009-000329341 only briefly mentioned dish B and that Sui successfully appealed from the court's granting of defendants' motion to require Sui to post security under section 391.1 (vexatious litigant).

As to the alleged unlawful nonjudicial foreclosure, plaintiffs assert the issue was raised for the first time in this action because they "did not realize that non-judicial foreclosure on $530 is legally impermissible" and they filed this action after consulting with an "attorney who advised of the statutory requirement of $1,800."

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[4] Plaintiffs noticed their appeal from an earlier January 20, 2015 minute order which made the same rulings, but which was not signed by the court. (See § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court"].) The order was not reduced to a judgment of dismissal, signed by the court, until July 10, 2015. We have treated plaintiffs' premature notice of appeal as being entered immediately after entry of the judgment. (Cal. Rules of Court, rule 8.104(d)(1) & (2).)

Defendants argue that plaintiffs admit they paid the delinquent amounts under protest, such that a foreclosure sale was never conducted.[5]

Under section 430.10, subdivision (c), a defendant may demur to the pleading on the ground that "[t]here is another action pending between the same parties on the same cause of action." A demurrer on this ground is a plea in abatement. (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 788.) The question of whether the "same cause of action" is involved in both actions (§ 430.10, subd. (c)) "is determined by a comparison of the facts alleged which show the nature of the invasion of plaintiff's primary right" (*Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1384). If "the court determines there is another action pending raising substantially the same issues between the same parties, it is to enter the interlocutory judgment specified in" section 597 (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574) "to the effect that no trial shall be had on the merits until final determination of the first action" (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1149, p. 573). "Thereafter, if the first action results in a judgment on the merits for the defendant, his or her plea in abatement becomes a 'plea in bar,' i.e., instead of a temporary objection to trial of the second action, the defendant has a permanent defense of res judicata." (*Id.* at p. 574.)

Res judicata "'operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action.'" (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.) "For purposes of identifying a cause of action under the doctrine of res judicata, 'California has consistently applied the "primary rights" theory, under which the invasion of one primary right gives rise to a single cause of action.'" (*Ibid.*) "'[I]f the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms or kinds of relief he may

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[5] Plaintiffs' reply brief states the bankruptcy court authorized the sale of the house.

claim that he is entitled to, and may ask to recover; the relief is no part of the cause of action.'" (*Id.* at p. 341.) "The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced" (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798) or the addition of new facts supporting recovery (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160).

We independently review a court's determination that an action is barred by the doctrine of res judicata, because the matter presents a question of law. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 5, 10 [court granted defense motions for separate trial of special defenses under § 597].) Likewise, we independently review a court's sustaining of a special demurrer under section 430.10, subdivision (c), since it involves the same questions of law as does res judicata, i.e., whether two actions between the same parties involve the same causes of action.

We begin our review by examining two prior actions. In Sui's complaint filed in OCSC case No. 30-2009-000329341 against Price and Matteau, he alleged (1) in July 2009, he observed a satellite dish on Matteau's house, unit B, which was visible from the common driveway; (2) Sui complained to Price and Matteau, but they refused to remove the dish; and (3) by doing so, Price and Matteau violated the CC&R's which they had been elected to enforce. The case was dismissed with prejudice by Sui's bankruptcy trustee. Sui appealed and the OCSC appellate division affirmed the dismissal based on Sui's bankruptcy trustee's global settlement of several cases.

In Sui's complaint against defendants in OCSC case No. 06CC07649, filed in 2006 and amended in 2007, he alleged defendants initiated unjustified foreclosure by doctoring unrelated "'Harkins' charges" and that he paid "the full sum requested by the Association including 'Harkins charges' under protest." The court entered judgment in favor of defendants Matteau and the Association on the first through third causes of action after granting their motion for judgment (§ 631.8) after Sui presented his case;

dismissed Price because he was not served with the summons and complaint; and dismissed the fourth cause of action with prejudice at Sui's request. Sui did not appeal.

The prerequisite elements for applying the doctrine of res judicata, whether as to claim preclusion or collateral estoppel, are: "'"(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]"'" (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th at p. 797.)

As to the first element (identical cause of action), the instant action and the prior ones involved "the same injury to the plaintiff and the same wrong by the defendant," resulting in the same primary right being at stake. (*Tensor Group v. City of Glendale*, *supra*, 14 Cal.App.4th at p. 160.) As to the satellite dish on unit B, the alleged wrong is that defendants installed a satellite dish on unit B, and the alleged injury is that plaintiffs wanted the dish to be removed. As to the alleged foreclosure proceedings, the alleged wrong is that defendants initiated nonjudicial foreclosure proceedings based on plaintiffs' failure to pay assessments and associated legal fees charged by attorney Harkin, resulting in the alleged injury that plaintiffs made a payment under protest. It matters not that plaintiffs purportedly raised a new legal theory ("statutory requirement of $1,800") as to their foreclosure proceedings cause of action. (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th at p. 798.)

As to the second element (final judgment on the merits), although OCSC case No. 30-2009-000329341 was dismissed with prejudice by Sui's bankruptcy trustee and the fourth cause of action in OCSC case No. 06CC07649 was dismissed with prejudice at Sui's request, the "bar raised by a dismissal with prejudice is equal, under the doctrine of res judicata, to the bar raised by a judgment on the merits." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821.) As to the other causes of

action in OCSC case No. 06CC07649, a court's granting of a motion for judgment "operates as an adjudication upon the merits." (§ 631.8, subd. (c).)

As to the third element (same parties or persons in privity to a party), "privity" in the context of res judicata refers to a relationship between persons "which is 'sufficiently close.'" (*Mueller v. J. C. Penney Co.* (1985) 173 Cal.App.3d 713, 723.) Yang, as Sui's spouse and co-homeowner, was in privity with him. The Association was in privity with Price and Matteau, who were both officers of the Association.

Thus, the court properly determined that plaintiffs' satellite dish and foreclosure proceedings claims in the instant action alleged the same causes of action pleaded and decided in the prior actions, and therefore the doctrine of res judicata barred plaintiffs' claims in the FAC.

But plaintiffs contend the court should have granted them leave to amend their complaint because their "lawsuit merely reflect[s] harmless defective pleadings" concerning "inadvertently-inserted van towing with its resultant debt reporting." Not so. The instant action involves "unnecessary duplication of litigation over the same claim[s,] a serious and unwarranted burden on" defendants. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1138, p. 563.) (As stated in defendants' brief, "In addition to this Action, five other actions have been filed relating to the same issues, and other lawsuits on other issues as well, heaping misfortune on the other owners of this small Development of only five homes.") Plaintiffs have failed to meet their burden to demonstrate a reasonable possibility that the defect can be cured by amendment. (*Sui v. Price* (2011) 196 Cal.App.4th 933, 938-939.)

The court did not err by sustaining without leave to amend defendants' demurrer, dismissing plaintiffs' action with prejudice, and entering judgment in defendants' favor.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.